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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 953

INDUSTRIAL WORKERS OF THE WORLD, ET AL.,
Petitioners,

v.

RAMSEY CLARK,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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R. R. DONNELLEY & SONS COMPANY, CHICAGO

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Petitioner is entitled to review of the listing procedure and to a reversal because that procedure violated due process requirements and because members of listed organizations are subject to continuing harm by the original listing. The government seeks to avoid review relying solely on an argument of laches, but the government is in error putting forth this argument. The courts below rejected laches as the basis for their rulings and laches is not supported by the record. The courts below held that failure to file objections within the time pre-

scribed barred review. That was error because the redesignation continued to violate due process contrary to what this Court said in the *Joint Anti-Fascist* case.

1. The Courts below were correct when they rejected the government's argument of laches, but erred holding that petitioner was barred from attacking the original listing for failure to file within the time period for administrative review.

The Court below held that petitioner had failed to object to the listing within the time period for administrative review (Opinion, Appendix pp. 1–4), and that upon such failure, the trial court did not abuse its discretion in relying on this ground (Opinion, Appendix, pp. 9–10). The Court decided that the period on the face of the Attorney General's regulations which was 10 days for objecting was too "cabined and confined," *Lane v. Wilson*, 307 U.S. 268, 276 (1939), but decided that petitioner had 38 days to object, even though there was no actual notice during that period. That is a construction by the Court in order to apply that supposedly larger period against petitioner, and this is contrary to *Cole v. Young*, 351 U.S. 536 (1956) at p. 556, which holds that these same regulations adopted under Executive Order 10450 are to be construed against the Attorney General.

2. Laches is not supported by the record.

The government misapprehends the record when it relies on laches.

a. Petitioner was not guilty of Laches.

Laches requires unexplained delay, and harm to the opposing party. The delay here was necessary to exhaust administrative review by the invitation of the Attorney General of informal review. As soon as review ended, petitioner filed suit, and this is not delay that would support laches, *Duncan v. Summerfeld*, 251 F. 2d 896,897 (D.C. Cir. 1957). *Jones v. Sum-*

merfeld, 265 F. 2d 124 (D.C. Cir. 1959), where no such reason for delay appeared in the record is therefore distinguished. Further, the *Jones* case does not apply as this Court held that there are special rules in employment cases, *Arant v. Lane*, 249 U.S. 367, (1919), 372, and this is not an employment case.

In addition, no harm to the Attorney General is claimed. Instead all that the government says here is (Memorandum p. 3):

> "Petitioners have failed to establish any reason why the Attorney General should now be put to the burden of proving that action taken by one of his predecessors some fourteen years ago was correct, . . ."

However, the Attorney General is charged with the action of his predecessor, *H.S.D. Co. v. Kavanagh*, 191 F. 2d 831, 6 Cir., 1951, 846, and this bold statement is not a substitute for the requisite showing of harm. Instead of harm by delay to the Attorney General there has been continuing harm to listed organizations and to their members, by the listing procedure which was action aptly characterized by Zechariah Caffee, Jr. Civil Liberties Under Attack, at p. 57:

> "It is something quite new to punish men drastically who have done nothing wrong, merely for fear that they might do something wrong."

Finally neither *Lindall v. Northern Pac. Ry. Co.*, 122 F. Supp. 253, D.C.D.C. 1954, 258, affirmed 223 F. 2d 316, 1955, cert. den. 350 U.S. 844, nor *National Lawyers Guild v. Brownell*, 225 F. 2d 552, D.C. Cir., 1955 cert. den. 351 U.S. 927, apply. In the former the unexplained delay was for over fifty years, and requisite harm followed. And delay alone is not laches, but merely raises an evidentiary question, *B-W Construction Co. v. United States*, 100 Ct. Cl. 227 (1943), *Kaiser Aluminum & Chem. Co. v. United States*, 36 U.S. Law Week 1094, 2363 (1967). In the *National Lawyers Guild* case there was a failure

to exhaust administrative review. Laches was not at issue. There is no basis for laches in the present case.

Alternatively,

> b. the period for seeking review was tolled, or the Attorney General is estopped from asserting laches.

As set out in the opening brief (p. 9), the action of the Attorney General tolled the period for seeking review, *Honda v. Clark*, 18 L. Ed. 2d 244 (1967). Alternatively, the Attorney General is estopped from asserting laches by his invitation for informal review, *H.S.D. Co. v. Kavanagh*, 191 F. 2d 831, 6 Cir., 1951, 846, *supra*, and *Bennet v. United States*, 371 F. 2d 859, 1967.

3. The relief granted below is inadequate.

The Attorney General, in his procedure for informal review, invited (Ex. C, pp. 29–30 J.A.)

> "new information that tends to cast doubt upon the propriety of the original decision to designate, there would appear to be little purpose in reviewing the separate, but unanimous findings of three former Attorney Generals."

Petitioner submitted new information as to the propriety of the original designation in the *Thompson* case. In that case the entire history of the organization was put into issue by the government. The Court below decided that petitioner was entitled to relief, but only for a hearing for removal on changed circumstances, in effect requiring petitioner to concede to the propriety of the original listing (Opinion, Appendix p. 11). This relief is inadequate.

As stated above, the Attorney General is estopped from withdrawing the relief offered. More important, the Attorney General disregarded what this Court said in the *Joint Anti-Fascist* case, about his failure to comply with requirements of due process when the list was compiled under Executive Order

9835 and redesignated the organizations under Executive Order 10450 without notice, charges, or hearing.

The listing continues to cause harm by denying first amendment rights to listed organizations and to their members. This was recognized in the Opinion below (Appendix p. 2), and has been before this Court most recently in *Schneider v. Smith*, U.S. (1968) (36 U.S. Law Week 4131, 1/16/68), in *Cole v. Young*, 351 U.S. 536 (1956), and in the *Joint Anti-Fascist* case itself. And see *Keyshian v. Board of Regents of New York*, 385 U.S. 589, 1967, *Reed v. Gardner* (35 U.S. Law Week, 2277, 1967) *Shelton v. Turner*, 364 U.S. 479, 1960, and cases cited in petitioner's opening brief (p. 8–10).

The Attorney General should not be permitted to avoid review of the listing procedure, which has caused this harm, where no procedure consistent with due process for avoiding the listing ever was adopted. The Court below found that the Attorney General was arbitrary when he refused review for delisting. That same arbitrariness applies to review of the listing procedure itself and petitioner is entitled to review now.

CONCLUSION

The relief afforded below was inadequate. The action of the predecessors of the present Attorney General was in violation of the Fifth Amendment, and continues to cause harm in violation of the First Amendment and the Attorney General cannot avoid review by claiming laches. This Court should grant review, and declare the list void, invalid, and of no effect.

Respectfully submitted,

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